SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-000594-D

FURLONG DEVELOPMENT CO., LLC and
GORDON STACY

APPELLANTS

v.

APPEAL FROM SCOTT CIRCUIT COURT
HON. ROBERT G. JOHNSON
CASE NO. 11-CI-00111

COURT OF APPEALS CASE NOS. 2011-CA-001771 & 2012-CA-001925

GEORGETOWN-SCOTT COUNTY PLANNING
AND ZONING COMMISSION, EGT PROPERTIES, INC.
UNITED BANK AND TRUST COMPANY

APPELLEES

BRIEF OF APPELLEES GEORGETOWN-SCOTT COUNTY PLANNING AND ZONING COMMISSION

Respectfully submitted,

Charlie Perkins
209 East Main Street
Georgetown, KY 40324
(502) 863-9809
COUNSEL FOR APPELLEE

CERTIFICATE PURSUANT TO CIVIL RULE 76.12(6)

The undersigned certifies that a true and accurate copy of the Appellees' Brief was served upon each of the following via U.S. mail, postage prepaid, this 7th of December, 2015: (1) Jeffrey C. Rager, Rager Law Firm, PLLC, 444 Lewis Hargett Circle, Suite 125, Lexington, KY 40503; (2) Steven B. Loy, Stoll Keenon Ogden PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507; (3) Wendell L. Jones, Alber Crafton PSC, 9418 Norton Commons Blvd., Suite 200, Prospect, KY 40059; (4) Clerk, Kentucky Court of Appeals, 360 Democratic Drive, Frankfort, KY 40601; (5) Clerk, Scott Circuit Court, 119 N. Hamilton Street, Georgetown, KY 40324; and (6) Hon. Robert G. Johnson, Scott County Justice Center, 119 N. Hamilton Street, Georgetown, KY 40324. The undersigned has not checked out the record since the matter was transferred to the Kentucky Supreme Court.

Charlie Perkins

Counsel for Appellee

STATEMENT CONCERNING ORAL ARGUMENT

Appellee Georgetown-Scott County Planning and Zoning Commission does not believe oral argument will be helpful because the relevant contracts (the bonds issued to the Commission) are unambiguous and speak for themselves.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Furlong Development Company, LLC and Gordon Stacy (collectively, "Furlong") make arguments to this Court that, if accepted, would radically deprive planning commissions across the Commonwealth of their surety agreements. In reality, Furlong is attempting to carry the water in this appeal for Platte River Insurance Company ("Platte River"), a professional surety company, that issued bonds in favor of the Georgetown-Scott County Planning and Zoning Commission ("Commission"). With respect to the Commission, the legal question is simple: Is Platte River bound to the Commission by the plain terms of the bonds it issued? The most basic principles of contract law demonstrate that the answer is yes.

Furlong applied to the Commission for plat approval for property located in Scott County known as the Enclave Subdivision. (Vol. II, R. 232). In order to obtain the Commission's approval, Furlong was required to comply with the Commission's requirements for developing subdivisions. (*Id.*) KRS 100.281(4) requires that the Commission's regulations contain specifications for the "provision of good and sufficient surety to insure proper completion of physical improvements" of the public infrastructure in subdivisions, such as sidewalks and streets. Accordingly, the Commission's regulations required Furlong to either construct and install the public improvements, such as streets, or obtain a bond for 125% of the estimated costs of those improvements before the Commission would approve the final plat. (Vol. III, R. 313, 315).

Furlong chose to obtain bonds for the public improvements from Platte River. (Vol. II, R. 232). Furlong also entered into an indemnity agreement with Platte River that required Furlong to repay Platte River if the bonds were called. (Vol. I, R. 91). The

Commission is not a party to the indemnity agreement and has no interest in any dispute between Furlong and Platte River about indemnity.

The public improvements that are covered by the bonds are sidewalks, handicap ramps, storm cleanup, landscaping, and the final layer of asphalt. (Vol. II, R. 245-50.) Once the bonds were in place, the Commission approved the final plat, which allowed Furlong to sell lots. (Vol. II, R. 232; KRS 100.277(3)).

The bonds make clear that they will not be released until either ***Platte River or Furlong*** – and nobody else -- complete the improvements or the pay the costs of the improvements. The specific language provides that Platte River and Furlong "are jointly and severally held and firmly bound unto Georgetown-Scott County Planning Commission" for "the costs of labor and materials and successful construction, completion and acceptance of all improvements" and that Platte River's and Furlong's liability on the bonds can only be extinguished if "the Principal shall perform each and every portion of the approved plan…otherwise it shall remain in full force and effect." (Vol. II, R. 245-50).

Before Furlong completed the work required by its approved plats, it defaulted on its loans, quit the project, and surrendered the property to United Bank and Trust Company ("United Bank") to avoid foreclosure. (Vol. II, R. 232). The incomplete work included the improvements secured by the bonds. (*Id.*) On August 15, 2008, after the Commission learned that Furlong would not be finishing the bonded work, the Commission called the bonds and notified Platte River that it must satisfy its obligations under the bonds. (Vol. I, R. 38-39; Vol. II, R. 232-33). By the terms of the three bonds, Platte River is liable to the Commission for $148,287.50. (Vol. II, R. 245-50).

Platte River has flatly refused to live up to its bond obligations to the Commission. Instead, on December 22, 2008, Platte River sued Furlong and Stacy in Kentucky federal court. (Vol. II, R. 233). The Complaint requested that the court require Furlong and Stacy, jointly and severally, to reimburse Platte River pursuant to an indemnification agreement between them for Platte River's costs incurred in the "***fulfilling of its obligations under the terms of the Subdivision Bonds***." (*Id.*) (emphasis added). The Complaint, in requesting specific performance, further sought to require Furlong and Stacy to "honor their obligations" under the indemnification agreement. *(Id.)* These allegations are completely inconsistent with the arguments Platte River has made in this case. Moreover, the allegations admit that Platte River has "obligations under the terms" of the bonds. Platte River should be bound by these admissions and should not be allowed to attempt to avoid those admissions in another proceeding.

In response to the federal lawsuit, Furlong instituted this action against the Commission, Platte River and United Bank seeking to enjoin the Commission from calling the bonds. *(Id.)* Because the terms of the bonds unambiguously require Platte River to remit the value of the bonds to the Commission, the Commission moved for summary judgment. (Vol. II, R. 229-30). United Bank also moved for summary judgment because the deed Furlong executed in lieu of foreclosure stated that United Bank was not assuming Furlong's obligations to third parties, such as the Commission. (Vol. I, R. 86-87).

On August 29, 2011, the Scott Circuit Court granted the Commission's and United Bank's motions for summary judgment. (Vol. III, R. 365-69). The court found that while "Furlong and Stacy do not want to be fully responsible for their inability to

finish the development," "[t]hey agreed to...indemnify [Platte River] under the bonds if they were not able to complete the work that was required." (Vol. III, R. 368). The court further found that Platte River's "basic argument" "that it should not have to honor its commitment under the bonds" was "preposterous" and given the nature of Platte River's business could have been "made in bad faith." (*Id.*)

Furlong appealed the summary judgment order to the Court of Appeals. (Vol. III, R. 384). Before the Court of Appeals ruled, Furlong filed a Motion for Relief from Final Judgment under Civil Procedure Rule ("CR") 60.02 in the Scott Circuit Court.[1] Furlong claimed it had "new" evidence, which consisted of purported statements by Furlong's insurance broker and a former Commission employee regarding whether United Bank would be posting new bonds. (2012-CA-001925, R. 3-12). On October 5, 2012, the Scott Circuit Court entered an order denying Furlong's Motion. Furlong appealed that ruling to the Court of Appeals, which was later consolidated with the first appeal.

On March 14, 2014, the Court of Appeals affirmed both of the Scott Circuit Court's orders. Furlong moved for rehearing, which was denied. Furlong then moved for discretionary review, which was granted by this Court.

ARGUMENT

I. Introduction

Developing a subdivision can be a risky business—market conditions, subcontractor performance, and financial pressures are only a few of the innumerable reasons why developments fail. And when they fail, local governments, as well as the developer, may suffer. Planning and zoning commissions are the fulcrums in fostering

[1] Record citations to the appeal of the CR 60.02 Motion, prior to consolidation, are noted by the "2012-CA-001925" prefix.

growth in the supply of housing while protecting communities from incomplete developments and insufficient public improvements. Subdivision bonds are a cornerstone protection in this careful balance; allowing developers to begin selling lots before the subdivision is complete while ensuring the costs of the public improvements are covered should the developer quit the project for whatever reason. Platte River and Furlong, in trying to avoid the unambiguous language of the bonds they issued to the Commission, have made sweeping arguments about when such subdivision bonds "mature." These arguments, which conflict with Kentucky's statutory scheme and the Commission's regulations, would deprive planning and zoning commissions and the communities they serve of the important financial protections subdivision bonds provide. This Court need not reach these irrelevant claims because the questions raised in this appeal regarding the Commission are resolved entirely by the plain language of the bonds at issue.

II. Standard of Review

In reviewing the Scott Circuit Court's grant of summary judgment, this Court determines whether a disputed material issue of fact exists. The Court also determines whether the moving party is entitled to judgment as a matter of law. *Hammons v. Hammons*, 327 S.W.3d 444, 448 (Ky. 2010). The plain language of the bonds at issue – which is a pure issue of contract interpretation for the courts -- demonstrates there are no material disputed facts and the Commission remains entitled to judgment as a matter of law. With respect to the CR 60.02 Motion, the "trial court enjoys a great deal of discretion in ruling on matters brought subject to CR 60.02." *Richardson v. Head*, 236 S.W.3d 17, 20 (Ky. App. 2007). Such discretion will not be disturbed absent arbitrary, unreasonable, unfair, or unsupported conduct or decision making. *Commonwealth v.*

English, 993 S.W.2d 941, 945 (Ky. 1999). The Scott Circuit Court's denial of Furlong's CR 60.02 Motion was proper and did not run afoul of the court's discretion.

III. Summary Judgment Was Granted Based on the Unambiguous Bonds

A. The Bonds Were Called According to the Parties' Agreed Upon Terms

Kentucky courts have long held that parties are bound by the terms of the clear and unambiguous bonds they issue. *Standard Acc. Ins. Co. of Detroit v. Rose*, 234 S.W.2d 728, 731 (Ky. 1950). This is because a "bond agreement is a contract and the parties to the contract are free to agree upon its terms and conditions." *Five Star Lodging, Inc. v. George Constr., LLC*, 344 S.W.3d 119, 123 (Ky. App. 2010). An unambiguous written contract, such as the bonds, must be strictly enforced according to the plain meaning of its express terms and without resort to extrinsic evidence. *Allen v. Lawyers Mut. Ins. Co. of Kentucky*, 216 S.W.3d 657, 659 (Ky. App. 2007).

It is undisputed that Furlong elected to obtain bonds in lieu of fully constructing the public improvements in the Enclave Subdivision it was developing. It is likewise undisputed that Furlong obtained the bonds from Platte River and that Platte River authored the bonds. Vol. II, R. 245-50. Furlong has never claimed the bonds are ambiguous or that the Scott Circuit Court erred in its interpretation of the bonds.

The terms of the bonds are simple, yet precise. The bonds set forth that Furlong, as the principal obligor, and that Platte River, as surety, "are jointly and severally held and firmly bound unto Georgetown-Scott County Planning Commission." Vol. II, R. 245-50. Further, the bonds "shall secure the costs of labor and materials and successful construction, completion and acceptance of all improvements as set forth in the improvements plan." *Id.* Finally, the bonds state that the "condition of this obligation is such that ***if the Principal shall perform each and every portion of the approved plan,***

then this obligation shall be null and void; otherwise it shall remain in full force and effect." *Id.* (emphasis added).

Under the plain language of the bonds, Platte River and Furlong are jointly and severally liable for the costs of the successful completion of the bonded improvements, and Platte River's and Furlong's liability under the bonds is extinguished if, and only if, Furlong performed ***each and every portion of the approved plan***. Furlong, as conceded in its complaint, did not perform each and every portion of the approved plan, including the improvements for which the bonds were issued. Vol. I, R. 9-10.

Instead, Furlong abandoned the Enclave Subdivision when it transferred its ownership of the property to United Bank to avoid foreclosure. *Id.* The Commission, upon learning that Furlong would not be completing the bonded work, called the bonds in accordance with their terms, as the bonds rendered Platte River liable for the costs associated with successfully completing the improvements upon Furlong's failure to perform. Because the terms of the bonds are clear and unambiguous, they must be enforced. *Standard Acc. Ins. Co. of Detroit,* 234 S.W.2d at 732.

Nevertheless, Furlong continues to make contractual arguments—all of which have been rejected by the courts below—that seek to extinguish Furlong's obligation to indemnify Platte River for the bonds. Furlong's theories are that: (1) executing the deed in lieu foreclosure terminated Platte River's and Furlong's liability to the Commission under the bonds or that (2) by accepting the deed in lieu of foreclosure, United Bank assumed liability for the bonded improvements.

These arguments misstate the nature of both the bonds and the deed, as the Commission is not a party to the deed and United Bank is not a party to the bonds.

Neither United Bank nor Furlong nor Platte River has the legal ability to affect the Commission's rights under the bonds without the Commission's consent. Under the well-established doctrine of novation United Bank ***could not*** assume or release Platte River's and/or Furlong's liabilities under the bonds without the Commission's agreement. *Wells Fargo Financial Kentucky, Inc. v. Thomer*, 315 S.W.3d 335, 339 (Ky. App. 2010) (holding that without the creditor's consent, an agreement by the debtor with a third party cannot divest the creditor of its claim against the debtor). In determining whether novation has occurred, the intent of the parties is controlling. *Clark v. Thompson*, 219 S.W.2d 22, 28 (Ky. 1948). And, the Commission has never agreed to release Platte River or Furlong from their bond liabilities. To the contrary, once the Commission realized that Furlong had stopped work on the development, it called the bonds. That is the direct opposite of a novation and, tellingly, Furlong has never alleged novation has occurred.

B. There Are No Other Triggers to the Commission Calling the Bonds

Upon Furlong's failure to complete the bonded improvements, the Commission was entitled to call the bonds. There were no other conditions that had to be met. In an effort to rewrite the bonds, Furlong claims that the Commission is required to suffer financial damage before the bonds can be called. Furlong Brief at 15-16. Furlong alleges that because the Commission has not yet funded the cost of constructing the bonded improvements, the Commission has not yet been "damaged" enough that the bonds can be called. *Id.*

When faced with the same argument, other courts have held that the damages are the cost of bringing the subdivision into compliance by installing the bargained-for improvements and that the damages exist even if the public entity has not yet completed

the improvements. *City of Merced v. American Motorists Ins. Co.*, 126 Cal.App.4th 1316, 1323 (2005). The *Merced* facts were strikingly similar; a subdivision developer defaulted prior to completing bonded improvements, the bank took title to the property and the city in whose favor the bond was issued called the bond. *Id.* at 1318-21. The court enforced the bond and rejected the very same arguments Furlong is making. *Id.* at 1323-24.

Likewise, in *Bd. of Supervisors of Stafford County v. Safeco Ins. Co. of America*, 310 S.E.2d 445, 448-49 (Va. 1983), the Supreme Court of Virginia held that "[i]t was unnecessary for the County to prove a financial loss as a prerequisite to recover from Safeco [the surety]. A performance bond is intended to guarantee completion of the improvements it covers. Thus, the obligee of such a bond need not incur any expense or do any work on the improvements before collecting on the bond." *Id.* Moreover, Furlong's suggestion that the Commission or United Bank will receive a "windfall" or pocket the money if Platte River complies with the bonds is simply false; the value of the bonds will be used to construct the improvements. Furlong Brief at 5. When bonds like these are called, the Commission can either contract to have the improvements constructed directly, or have a developer construct the improvements and reimburse the developer.

Furlong also argues that the Commission is presently not entitled to the bond proceeds by suggesting that the purpose of the bonds is to cover the costs of *redoing* the bonded improvements, instead of covering the costs of *constructing* the bonded improvements. Furlong Brief at 1-16. Furlong alleges that the "purpose of the bonds was so that the taxpayers of Scott County would not have to shoulder the burden of

paying to *repair* streets, *replace* damaged sidewalks, and *clean out* construction debris from storm drains…The need for *repairs* had simply not arisen." *Id.* at 15. (emphasis added). Furlong's characterization of the bonds' purpose is erroneous. As stated on the face of the bonds, the purpose of the bonds was to cover "the costs of labor and materials and successful construction, completion and acceptance of" the bonded improvements. Vol. I, R. 14-19.

If the Commission were required to construct and shoulder the costs of the public improvements before the bonds could be called, then the Commission would not have good and sufficient surety. Instead, it would have an indemnity agreement for reimbursement of the monetary loss associated with constructing the public improvements that Furlong failed to finish; that is not what the Commission bargained for and not what Platte River provided.

IV. Furlong Fundamentally Mischaracterizes the Commission's Regulations

A. Furlong Confuses Subdivision Bonds with the Acceptance of Public Streets

Furlong's efforts to avoid its and Platte's River's obligations under the bonds are two-fold. Furlong's first tier arguments (which were addressed in the preceding section) allege that its transfer of the property somehow extinguished their and Platte River's liabilities under the bonds. Furlong's second tier arguments, however, ask this Court to find that neither Furlong nor Platte River were *ever* bound to the Commission because, according to Furlong, the obligations under the bonds had not "matured" when Furlong walked away from the development. These second tier arguments, which could extinguish every planning commission in the Commonwealth's surety agreements, are premised on fundamentally confusing *the timing of bonds* with *the timing of the*

acceptance of public streets under the Commission's regulations. It is critical to the work of planning commissions statewide that the Court rejects these erroneous arguments.

Furlong's brief repeatedly alleges that its obligations under the bonds had not yet "matured" at the time of its default. Furlong Brief at 10-12. Because the actual language of the bonds does not support this claim, Furlong argues "there was an implied condition of 80% of the homes on the Enclave to be built before work covered by the bonds was to be performed." Furlong Brief at 10. Furlong bases its "implied condition" argument on a Commission regulation stating that:

> Any proposed roadway to be dedicated to the City of Georgetown for maintenance can apply final inch of asphalt surface after 80 percent of the lots that are served by the roadway has received Certificate of Occupancy. Roads to be dedicated to Scott County are subject to the *Street Design and Specifications* adopted by the Fiscal Court on October 24, 1994.

Vol. III, R. 332-33. This regulation sets forth conditions the Commission has placed on developers regarding the construction of streets that are to be accepted as part of the city or county road system. It has ***nothing*** to do with the timing or obligations of subdivision bonds. The bonds are governed by their own language.

Furlong's argument ignores that the bonds covered not only the cost of the asphalt surface on the streets, but sidewalks, handicap ramps, storm cleanup, and landscaping. Vol. II, R. 245-50. The regulation that refers to 80% completion pertains only to streets that are to be dedicated to the city. Thus, even if the design standard regarding the final layer of asphalt for dedicated streets somehow affected when the bonds covering the asphalt "matured" (which they do not), there is no comparable regulation for the other

improvements covered by the bonds. This is yet another reason that Furlong's ill-fitting interpretation of the regulations does not make sense.

Platte River posted the subdivision bonds pursuant to a regulation that allowed Furlong to either construct and install the public improvements associated with the subdivision, or obtain a bond for 125% of the estimated costs of construction. The regulations require the developer to "install, file as as-built plans for, and have [the public improvements] field inspected by the Commission Engineer", ***or*** "[f]ile bond or letter of credit" to cover the costs of the improvements. Vol. III, R. 313. Completion of one of these two options was a condition precedent to obtaining approval of the final plat for the subdivision, which was required before the lots could be sold. *Id.* A second regulation, which pertains to the form of the bonds, states that:

> If the developer of a subdivision elects to secure construction of those site improvements herein permitted to be secured, he shall enter into a bond or letter of credit with and satisfactory to the Planning Commission to construct all remaining road (graveling and paving), storm and sanitary sewage systems, water systems and other improvements required by these regulations and conditions of the preliminary plat.

Vol. III, R. 315. The regulations are clear regarding the timing of the bond obligations—the final plat can only be approved if a bond that is satisfactory to the Commission is in place (or the improvements are installed).

Requiring that the public improvements be bonded or completed before lots are sold is critically important to planning commissions and the communities they serve. Without sufficient surety, local communities can be left without funds to construct the public improvements necessary to a housing development when the developer walks

away from the project before the improvements are completed. As Kentucky courts have recognized:

> Local governments are not obligated to develop private property, and indeed, developers must construct streets and other public improvements in a proper manner in order to hold the local government's maintenance costs to a minimum once the dedicated property has been accepted for public purposes. Most local governments barely have funds for necessary maintenance purposes, much less for original construction purposes.

Lampton v. Pinaire, 610 S.W.2d 915, 919 (Ky. App. 1980). In fact, KRS 100.281 requires that all subdivision regulations contain:

> Specifications for the physical improvements of streets, utilities, and other facilities, and the extent to which they shall be installed or dedicated as conditions precedent to approval of any plat, ***including the provision of good and sufficient surety to insure proper completion of physical improvements***

(emphasis added). The Commission's regulations allowed Furlong to obtain the benefit of recording the final plat before the public improvements were constructed in exchange for the financial assurances of the bonds. Unless the bonds matured at execution, the Commission would not have "good and sufficient surety," as required by KRS 100.281, despite its clear regulations and the bonds that Platte River issued.

Such an anomalous result would injure planning commissions and communities across the state. As recognized by Kentucky courts, the "construct or bond" choice in the Commission's regulation is commonplace in Kentucky:

> ***If the subdivision (streets, utilities, etc.) is built according to the blueprint, or a performance bond is posted, a final plat, the finished product, will be approved and recorded.*** KRS 100.281(1) provides for the recording of final plats only, and for a good reason. Only when the plat becomes final are the parties' rights and expectations fixed.

Greenway Enters. v. City of Frankfort, 148 S.W.3d 298, 301 (Ky. App. 2004) (emphasis added). Court decisions recognize the significance to both planning commissions and developers of having bonds in place by repeatedly holding that both the developer's *and* the planning commission's rights and expectations are vested when the final plat is approved. *Id.* In this case, Furlong was vested with the right to sell the lots and the Commission was vested with the right to the bond proceeds from Platte River if Furlong or Platte River failed to complete the improvements.

If this Court were to find that Platte River's and Furlong's obligations to the Commission were not bound when the bonds were executed, countless other surety agreements across the state would likewise be nullified. The adverse consequences would be swift; developers would be free to sell lots (presumably in Scott County until 80% of the homes are constructed) and fail to complete the public improvements in developments without financial consequence. This could leave new residents without sanitary sewers and other necessary infrastructure with local governments scrambling to foot the bill. If 80% of the homes had to be constructed before the surety became obligated to planning commissions, it would likewise create an incentive for developers to quit projects earlier, rather than later, in the development process by relieving the developer and surety from its financial obligations to planning commissions.

The regulation that Furlong claims is an "implied condition" to the bonds is instead a tool the Commission relies on to ensure that streets are constructed in a proper manner. This is to hold the City of Georgetown's maintenance costs to a minimum after the streets have been accepted into the City's road system. *Lampton*, 610 S.W.2d at 919. As such, the regulation is a design standard that contains benchmarks for roadway

construction. Its purpose and application is entirely separate from the purpose and application of the bonding regulations. In fact, the only common thread between the two regulations is that both provide financial protections to the local community in which the development is occurring. Furlong's attempts to conflate the two would deprive the Commission of important monetary assurances.

Furlong, consistent with its arguments in the lower courts, argues that cases from other jurisdictions command a different result. This is erroneous for two reasons. First, case law from other states cannot vary the terms of the bonds Platte River issued, nor can foreign decisions vary the Commission's regulations. Second, these cases all involve situations that are factually irrelevant to this appeal. The two cases Furlong cites involve situations where work had not yet begun on the developments. *County of Yuba v. Central Valley National Bank*, 20 Cal.App.3d 109 (1971); *Westchester Fire Ins. Co. v. City of Brooksville,* 731 F. Supp. 2d 1298 (M.S. Fla. 2010). Furlong's brief admits that in this case the subdivision was developed "to the point where houses could be built." Furlong Brief at 2.

B. The Commission's Regulations Do Not Require Furlong's Bonds to Be Replaced

Furlong titles a section of its brief, "Any New Developer Is Required to Bond the Subdivision." Furlong Brief at 16. Furlong provides no support for this claim in the brief; instead merely posing the "question" of whether United Bank was required to post a bond. Furlong Brief at 18. It was not; there is no regulation that requires a transferee of property to replace existing bonds. Likewise, there is no regulation that extinguishes a developer's obligations to the Commission simply because the property it is developing is transferred and the bonds here contain no such provisions.

Furlong's unfounded argument, if accepted, would materially narrow the scope of the Commission's financial protections in the event of developer default. If a surety and its principal were released from their bond obligations simply because the property was transferred—whether it be to avoid foreclosure like this case, through private sale, or public auction—the *only* scenario under which the surety and principal would *ever* be required to fulfill their contractual obligations would be if the developer failed to complete the bonded improvements but retained ownership of the property. Such restrictions, which conflict with the plain meaning of the bonds and are not based on the regulations themselves, whittle away the Commission's good and sufficient surety in the event of default. Platte River is a professional surety company; if it did not wish to remain obligated to the Commission in event the property was transferred, it should have attempted to negotiate such a condition in the bonds. It is undisputed it did not.

V. Furlong Mischaracterizes the Issue of Standing

Furlong's argument that the Court of Appeals improperly based a majority of its decision on standing is contradicted by the law and facts of this case. Furlong relies solely on *Harrison v. Leach*, 323 S.W.3d 702 (Ky. 2010), which held that an appellate court cannot, on its own motion, dismiss an appeal when it determines a party lacked standing to bring an action in the trial court. *Harrison* is irrelevant to this case because the Court of Appeals clearly did not dismiss Furlong's appeal in this case. It should also be noted that in *Harrison*, the Court of Appeals vacated the trial court's judgment. This Court, a year after *Harrison*, reiterated that an appellate court may affirm for any reason appearing in the record but must reverse only for preserved issues. *See Fischer v. Fischer*, 348 S.W.3d 582, 589-90 (Ky. 2011). Here, the Court of Appeals affirmed the trial court. Thus, *Harrison* is not relevant.

VI. Furlong's CR 60.02 Motion Was Correctly Denied

The Court of Appeals correctly denied Furlong's CR 60.02 Motion in finding that "[t]he 'newly discovered evidence' claimed by Furlong and Stacy failed to meet the rigid standards of CR 60.02." Court of Appeals at 14. The Court of Appeals further held that Furlong's claimed "new" evidence "was not material, and it would not have changed the outcome of the proceeding." *Id.* Because of this, the Scott Circuit Court "did not abuse its discretion by denying the motion for relief." *Id.*

Furlong's CR 60.02 Motion was premised on alleged conversations involving a former Commission engineer, United Bank employee, and Furlong's insurance broker in the Platte River transaction. These alleged conversations involved the same claims and same arguments regarding whether United Bank would or should post bonds with the Commission and the effect of the deed in lieu of foreclosure on Platte River's bonds. There is nothing new about the arguments. As such, the CR 60.02 Motion did not merit the extraordinary relief afforded by the rule, which requires the movant to satisfy five factors: (1) the evidence, if introduced, would probably result in a different outcome; (2) the newly discovered evidence is material; (3) the newly discovered evidence is not merely cumulative or impeaching; (4) the evidence was discovered after entry of judgment; and (5) the moving party was diligent in discovering the new evidence. The Court of Appeals has described satisfying these factors as "major hurdles." *Hopkins v. Ratliff*, 957 S.W.2d 300, 301-02 (Ky. App. 1997); *Richardson v. Head*, 236 S.W.3d at 20. Both lower courts correctly found that Furlong did not clear these hurdles. At the end of the day, United Bank did not agree to post new security and the Commission did not request it.

VII. Furlong's Claims Regarding Insufficient Discovery Ignore the Record

Furlong's final argument is that had the Commission and United Bank responded to ***Platte River's*** discovery requests, then somehow the outcome of the case would have been different. Furlong Brief at 32-39. This is simply false because, as the Scott Circuit Court properly found, no discovery was going to change the language of the contracts the parties executed. As United Bank argued to the Court of Appeals, Furlong does not have standing to challenge this issue because Platte River was the only party with a "present and substantial interest" in Platte River's discovery requests. *Plaza B.V. v. Stephens*, 913 S.W.2d 319, 322 (Ky. 1996). Furlong did not attempt to take discovery and did not file a written response to the Commission's and United Bank's Motion for a Protective Order.

Aside from lacking standing, the Scott Circuit Court granted summary judgment because the contracts at issue, which are the bonds and the deed in lieu of foreclosure, are unambiguous. Even if the Commission had answered Platte River's irrelevant discovery requests, Furlong would not have been able to utilize extrinsic evidence to vary the terms of the unambiguous bonds or the deed in lieu of foreclosure. *Childers & Venters*, 460 S.W.2d 343, 345 (Ky. 1970).

CONCLUSION

Returning to the Commission's opening point, developing a subdivision is risky. Final approval of a plat, subdivision bonds, and the Commission's regulations protect both the developer and the Commission by defining the rights and obligations of each. Here, Furlong failed to complete the Enclave Subdivision, leaving the public improvements unfinished. The Commission respectfully requests that this Court affirm the Court of Appeals' and Scott Circuit Court's decisions holding that Platte River is liable to the Commission in accordance with the bonds it issued.

Respectfully submitted,

Charlie Perkins
209 East Main Street
Georgetown, KY 40324
(502) 863-9809
COUNSEL FOR APPELLEE